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NO. 80-1459

SUPREME COURT OF THE UNITED STATES

October Term, 1980

ARTHUR K. GREEN, JR.

Petitioner

vs.

Richard S. Schweiker, Secretary of Health and Human Services

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED

WHAT IS THE EVIDENTIARY SIGNIFICANCE IF ANY, OF A VETERAN'S ADMINISTRATION FINDING OF 100% DISABILITY OF AN APPLICANT, ON A SUBSEQUENT DEPARTMENT OF HEALTH, EDUCATION AND WELFARE DETERMINATION OF DISABILITY OF THE SAME APPLICANT UNDER THE SOCIAL SECURITY ACT?

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PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Petitioner prays that this Court review the judgment herein.

Decisions Below

No official citations. The appendix contains the lower Court decisions.

Jurisdiction

The date of the order from which relief is sought is November 24, 1980. No rehearings were sought. No extensions have been prayed for at any time.

The statutory provision believed to confer jurisdiction on this Court is 28 U.S.C. §1254, §1331 and §1346

PETITION FOR WRIT OF CERTIORARI

Outline of Case

Petitioner moved the District Court for remand because of the Secretary-Respondent's disregard, in the analysis of a Social Security disability claim, of the uncontroverted fact that the Veteran's Administration had made a prior determination that the petitioner claimant was 100% disabled under the same basic criteria used by the Secretary-Respondent.

The Sixth Circuit Court of Appeals held that;

> "Plaintiff's reliance on the Veteran's Administration's determination of 100% disability is insufficient to meet his burden in light of the overwhelming contrary evidence supporting the Secretary."

I

WHAT IS THE EVIDENTIARY SIGNIFICANCE IF ANY, OF A VETERAN'S ADMINISTRATION

FINDING OF 100% DISABILITY OF AN APPLICANT ON A SUBSEQUENT DEPARTMENT OF HEALTH, EDUCATION AND WELFARE DETERMINATION OF DISABILITY OF THE SAME APPLICANT UNDER THE SOCIAL SECURITY ACT?

This petitioner urges the position that where the evidence before the Secretary on the initial determination is that a 100% disabled, (Veteran's Administration determination), Viet Nam Veteran is totally and permanently disabled by obesity, heart disease, hypertension and that these disabilities are service connected, then the Secretary cannot disregard the Veteran's Administration finding of disability and service connection.

In the case at bar the tenor of the Secretary's and lower court findings was that if the applicant would loose weight

he would not have high blood pressure and that evidence of heart disease would be minimal. These findings by innuendo do not take into account any evidence that the claimant is capable of controlled weight loss. These findings were made in the face of evidence, that was not accepted into the consideration, that the obesity and related diseases were precipitated by the effects of war and other service activity.

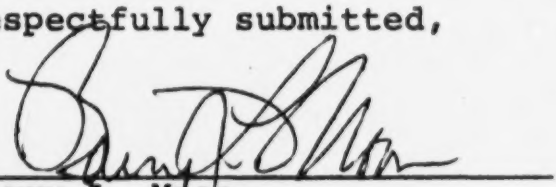
Petitioner contends that the fair and equal administration of this remedial statute, 42 U.S.C.§ 423 (d) (1) (A) requires a remand to the Secretary to consider and compare the award of another agency. Richardson vs. Richardson, 333 F.Supp. 890 (1971, D.C. VA).

The Court has jurisdiction to consider this matter because there is no other

review provided for this question. Therefore this court has jurisdiction under 28 U.S.C. § 1331, Mt. Sinai Hospital, Inc. vs Weinberger, 376 F. Supp 1099 (1974, D.C. Fla) rev'd on other grounds, 517 F 2d 329 (5th Cir.) mod on other grounds and reh den 522 F 2d 179 (5th Cir.) cert denied 425 U.S. 935.

For the reasons aforesaid, it is respectfully prayed that a Writ of Certiorari be granted.

Respectfully submitted,



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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ARTHUR K. GREEN, JR.

v.

JOSEPH A. CALIFANO, JR., Secretary of Health, Education and Welfare,

J U D G M E N T

This action came on for hearing before the Court, Honorable James Harvey, District Judge, presiding, and the issues having been duly heard and a decision having been rendered,

IT IS ORDERED AND ADJUDGED that the plaintiff take nothing and that the action be dismissed.

Dated: June 29, 1979 JOHN P. MAYER, CLERK

BY: Ruth A. Jozwiak,

Deputy Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ARTHUR K. GREEN, JR.

v. CIVIL ACTION
NO: 77-40167

JOSEPH A. CALIFANO, JR.,
SECRETARY OF HEALTH, EDUCATION,
AND WELFARE

MEMORANDUM OPINION AND ORDER

At a session of said Court, held in the Federal Building, Flint, Michigan on June 28, 1979

PRESENT: HONORABLE JAMES HARVEY
United States District Judge

This action is brought by plaintiff to obtain judicial review of a final decision of the Secretary of Health, Education and Welfare denying his claim for disability insurance benefits. The case is before the Court on plaintiff's motion to remand to the Secretary for further consideration. In this connection, plaintiff claims that the Secretary did not consider a report

from the Veteran's Administration that the olaintiff was not employable. The report is part of the administrative record certified to this Court by the defendant. The record conclusively demonstrates that the Veteran's Administration report in question was considered by the Administrative Law Judge, and by implication the Secretary as well, in reaching the determination that the plaintiff was not disabled within the meaning of Social Security Act. The Court believes, rather, that the instant motion should be treated as a motion for summary judgment on the grounds that the decision of the Secretary was not supported by substantial evidence, reflected in part by the Veteran's Administration report in question.

From the Court's review of the record, the Court finds substantial clinical evidence to support the finding of the Secretary that plaintiff's impairments

are not so severe as to preclude plaintiff from performing substantial gainful activity.

Accordingly, pursuant to 42 USC 405(g), plaintiff's motion for summary judgment is DENIED, summary judgment for the defendant is GRANTED, and judgment shall be entered accordingly.

IT IS SO ORDERED.

JAMES HARVEY
United States District Judge

No. 79-1492

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ARTHUR GREEN, JR.

v.

PATRICIA HARRIS, SECRETARY OF
HEALTH, EDUCATION AND WELFARE

O R D E R

Before: ENGEL, MERRITT and KENNEDY,
Circuit Judges

This appeal has been referred to a panel of the court pursuant to Rule 9(a), Rules of the Sixth Circuit. After examination of the briefs and record, this panel agrees unanimously that oral argument is not needed. Rule 34(2), Federal Rules of Appellate Procedure.

Plaintiff argues in his appeal from a

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judgment awarding summary judgment for the defendant that the Secretary did not seriously consider plaintiff's complaint of pain and suffering, his obesity as a cause of his hypertension and heart disease, the Veteran's Administration determination that he is 100% disabled, or the vocational expert's testimony.

It is determined that the District Court did not abuse its discretion in affirming the Secretary's decision denying social security disability benefits as it is supported by substantial evidence. See Allen v. Califano, 613 F.2d 139, 145 (6th Cir. 1980); Beavers v. Secretary of Health, Education and Welfare, 557 F.2d 383 (6th Cir. 1978); Hephner v. Mathews, 574 F.2d 359 (6th Cir. 1978).

Given the unanimity of the medical opinions and plaintiff's own vague descriptions of his disability, it is apparent that the

plaintiff, although suffering from certain ailments and problems that accompany obesity, has, nevertheless, failed to establish that his ailments are totally disabling within the meaning of the Social Security Act. It is important to observe that an ailment which may reasonably be considered remediable, such as obesity, cannot serve as a basis for a finding of disability. Henry v. Gardner, 381 F.2d 191, 195 (6th Cir. 1967); Stillwell v. Cohen, 411 F.2d 574 (th Cir. 1969); Mayhue v Gardner, 294 F.Supp. 853 (D. Kansas 1968), aff'd., 416 F.2d 1257 (10th Cir. 1969). Plaintiff's reliance on the Veterans Administration's determination of 100% disability is insufficient to meet his burden in light of the overwhelming contrary evidence supporting the Secretary. Moreover, the vocational expert established that there existed substantial gainful employment which the

plaintiff could perform. The vocational witness was not required to prove that the plaintiff would actually be hired for the jobs as he so argues on appeal. See 20 C.F.R. § 404.1509(b).

Finally, while the district court may have granted the defendant summary judgment without providing the parties with proper notice that it intended to construe and rule upon plaintiff's motion to remand as a motion for summary judgment, it is apparent that this procedure does not constitute reversible error. There was no apparent prejudice resulting therefrom. Hoopes v. Equifax, Inc., 611 F.2d 134 (6th Cir. 1979); Management Investors v. UMW, 610 F.2d 384 (6th Cir. 1979). In addition, plaintiff has abandoned any contention regarding the entry of the summary judgment because he has not raised this issue on appeal. McGraw v. United Ass'n

of Journeymen and Apprentices, 341 F.2d 705, 710 (6th Cir. 1965); United States of America v. Gooch, Jr., 603 F.2d 122, 126 (10th Cir. 1979); Spaulding v. Nielson, 599 F.2d 728, 730 (5th Cir. 1979).

It is, accordingly, ORDERED that the District Court's judgment be and hereby is affirmed pursuant to Rule 9(d)3, Rules of the Sixth Circuit, because the questions on which the cause depends are so unsubstantial as not to need further argument.

ENTERED BY ORDER OF THE COURT

JOHN P. HEHMAN, Clerk

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner prays that a Writ of Certiorari be issued to review the judgment herein of the United States Court of Appeals for the Sixth Circuit entered in the above entitled case on November 24, 1980.

42 U.S.C. § 423 (d)(1)(A)

(d) Definition of Disability. (1) The term "disability" means - (A) inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months: